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In the Supreme Court of the United States

DONALD RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT
FRIEND OF JOSE PADILLA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* SPARTACIST LEAGUE AND PARTISAN DEFENSE COMMITTEE ON BEHALF OF RESPONDENT JOSE PADILLA AND GRANTING HIS *WRIT OF HABEAS CORPUS*

RACHEL H. WOLKENSTEIN, ESQ.
(Counsel of Record)
PAUL COOPERSTEIN, ESQ.
67 Wall Street, Ste. 2411
New York, New York 10005
(212) 406-4252

Attorneys for *Amici Curiae* Spartacist
League and Partisan Defense Committee

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Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution," *Howard Law Journal*, Vol. 4, June 19583, 16
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Harold Laski, *The State in Theory and Practice* (NY: The Viking Press, 1935) 2, 15, 18
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INTEREST OF *AMICI CURIAE*[1]

The Spartacist League (SL) is a Marxist politica! organization with a forty year history of activity in the United States, including running candidates for public office, holding classes and public forums on Marxist history and international and domestic politics, initiating and participating in protest demonstrations against government policies and inaugurating a biweekly newspaper, *Workers Vanguard*, and a theoretical journal, *Spartacist*.

The SL seeks to educate the working class in the historic necessity for all mankind for the reorganization of society on the basis of a planned economy where production is based on human need, not profit. The SL seeks to educate workers and their allies to build a workers party which fights for a socialist future. It seeks to act, as Lenin described the role of the vanguard workers party, as a "tribune of the people." Thus the SL opposes **all** aspects of social oppression and government repression.

The Partisan Defense Committee (PDC) is a class-struggle, non-sectarian legal and social defense organization which champions cases and causes in the interest of the whole of the working people. This purpose is in accordance with the views of the SL. The PDC defends class-war prisoners, those imprisoned for standing up to racist, capitalist oppression, and has campaigned to "Free Mumia Abu-Jamal! Abolish the Racist Death Penalty." It has initiated united-front labor/black mobilizations against fascist organizations.

On February 9, 2002 the PDC with the Bay Area Labor Black League for Social Defense initiated the first labor-centered united-front protest in the U.S. in defense of immigrants on the basis of the slogans, "Anti-Terrorist Laws Target Immigrants, Blacks, Labor—No to the USA-Patriot Act and Maritime Security Act! Down with the Anti-Immigrant Witchhunt!" *Amici* call for: "Full Citizenship Rights for Immigrants." The core of the demonstration was dock workers of the International Longshore and Warehouse Union (ILWU) Local 10, joined by other trade unionists, Asian and

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[1]Counsel for *amici* authored this brief in whole, and no persons other than *amici* made a monetary contribution to its preparation and submission.

Near Eastern immigrants, blacks, college and high school students and supporters of the SL and other leftist organizations. The protest was organized with the understanding that defense of immigrants is defense of the whole working class. The PDC is guided by a principle of the early labor movement of this country: the slogan of the Industrial Workers of the World (IWW), "An injury to one is an injury to all."

The SL and PDC file this *Amici Curiae* brief in support of Jose Padilla because they are tenacious defenders of their own legality and of those democratic rights won through bourgeois revolutions and revolutionary wars—the parliamentary partisans in the English Civil War, the U.S. Revolutionary War, the French Revolution and the American Civil War. It took a bloody civil war to end slavery and another century of social struggle to end *de jure* segregation. The history of the American working class is one of the bloodiest in history. "Free" labor struggled in the face of government troops, strikebreaking court injunctions and prosecutions under criminal syndicalist laws before winning the basic legal right to organize. Out of those struggles working people and minorities wrested some expansion of democratic rights, which under capitalism are highly reversible.

History demonstrates that particularly when the populace is being prepared for war, or the ruling class feels threatened, democratic rights are constrained or denied. As Marxists, *amici* understand that the contraction of constitutionally protected rights is rooted in the class nature of the capitalist state. Harold Laski explains in his treatise, *The State in Theory and Practice* (1935) at 244:

> "...how accidental was the union of capitalism with democracy. It was the outcome, not of an essential harmony of inner principle, but of that epoch in economic evolution when capitalism was in its phase of expansion. It had conferred political power upon the masses; but it was upon the saving condition that political power should not be utilized to cut at the root of capitalist postulates. It would offer social reforms so long as these did not jeopardize the essential relations of the capitalist system. When they did,

> as occurred in the post-war [World War I] years, the contradiction between capitalism and democracy became the essential institutional feature of Western civilization."

A tool of government repression is to declare political opponents of government policy "terrorists." This defines them as "outlaws" of civil society, providing the state with a license to suspend democratic rights, criminalize political activity and ultimately to engage in legalized murder. The terrorist label is a "brand, stain, or mark of infamy...a modern Star of David; it is the contemporary stocks." Mitchell Franklin, "The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution," 4 *Howard Law Journal* at 182 (1958). It was the fate of the Black Panther Party (BPP) to be deemed a "terrorist" organization and "the greatest threat to internal security" by the Federal Bureau of Investigation (FBI), and it was subjected to a Counter-Intelligence Program (COINTELPRO) campaign of harassment, surveillance and prosecution; government agents killed some 38 members of the BPP.

Amici have challenged prior government attempts to criminalize the expression of First Amendment rights by falsely targeting opponents of government policy as terrorists. The SL successfully sued the Attorney General and the FBI in 1983 after the FBI changed its Guidelines designating political organizations as "domestic security terrorist organizations." As a result of that lawsuit, the FBI withdrew its witchhunting "definition" of the SL, thereby conceding that Marxist political principles and advocacy cannot be equated with violence, terrorism, or criminal enterprise.

Seizing on the September 11, 2001 criminal attack on the World Trade Center which killed thousands of innocent civilians, the Bush administration, with bipartisan support, embarked on a so-called preventative and pre-emptive global "war against terrorism." The next day, the SL/U.S. issued a statement:

> "Yesterday's attack on the World Trade Center, carried out through the hijacking of civilian airliners that killed hundreds of passengers and crew, was an

indefensible act of criminal terror. While it may be viewed as a symbol of the wealth and global reach of U.S. imperialism, the World Trade Center had workers of all races, ethnicities and religions who were employed there.... Those who perpetrated this horrific attack...embrace the same mentality as the racist rulers of America—identifying the working masses with their capitalist exploiters and oppressors! The ruling parties—Democrats and Republicans—are all too eager to be able to wield the bodies of those who were killed and wounded in order to reinforce capitalist class rule. It's an opportunity for the exploiters to peddle 'one nation indivisible' patriotism to try to direct the burgeoning anger at the bottom of this society away from themselves and toward an indefinable foreign 'enemy,' as well as immigrants in the U.S., and to reinforce their arsenal of domestic state repression against all the working people."

—*Workers Vanguard* No. 764 (14 September 2001)

In the pages of the SL's publications and in protests by the Spartacus Youth Clubs (SYCs) and the PDC, *amici* have denounced the Executive's assumption of imperial power and the government's witchhunt of immigrants from Islamic/Arab countries and warned that minorities, blacks, labor and all perceived opponents of the government's policies would be targets of this "war on terror." The government's objective is to smear, chill, inhibit, criminalize and penalize dissenting opinion and political action in opposition to government policy as threats to national security and support for terrorism.

"The purpose of the new measures is to revive and deepen the broad-ranging repression and intimidation that marked the Cold War McCarthyite witchhunt of 50 years ago. The aim today as then is to coerce the entire population into ideological conformity, with the government wielding the specter of seemingly pervasive 'Islamic terrorism' as a surrogate for Communism."

—*Workers Vanguard* No. 770 (7 December 2001)

In 2003, the SL and SYCs organized Revolutionary Internationalist Contingents at antiwar demonstrations leading up to and during the U.S. war against Iraq, demanding "All U.S. Troops Out of the Near East Now! Down With U.S. Imperialism! Defend Iraq! For Class Struggle Against U.S. Capitalist Rulers!" In February 2003, when New York City officials, with assistance from the federal government, banned an antiwar march in the name of the "war on terror," the PDC issued a protest and with the SL filed an *amici curiae* brief in the United States Court of Appeals for the Second Circuit.

That the ultimate targets of the "war against terrorism" are perceived political opponents of government policy and the labor movement is ever more apparent. Potential action by labor has been met with threats and government action. Trade unionists–from striking teachers in Middletown, New Jersey in 2001, to transit workers in New York City who voted to strike in 2002, to the National Education Association in February 2004–have been vilified as "terrorists" or "Taliban" intent on a "jihad." In June 2002, when the longshoremen's union on the West Coast was locked in a showdown with union-busting shipping bosses, Homeland Security chief Tom Ridge intervened to threaten that any strike action by the workers would be a threat to "national security." Then the Government brought down the *Taft-Hartley Act* effectively against the union. Firefighters who lost over 300 of their comrades trying to save people in the World Trade Center were declared a "clear and present danger to the United States" in a January 8, 2003 letter signed by Republican House majority leader Tom DeLay because they are unionized. On April 7, 2003, predicated on "intelligence" information in an anti-terrorism "advisory," riot-equipped police at the Port of Oakland opened fire on legal observers, longshoremen and port truckers and antiwar protesters, including supporters of the SL, with wooden bullets and concussion grenades.

The growing popular opposition to the *USA-Patriot Act*, evidenced by the resolutions passed in over 260 communities; the hundreds of thousands across the United States who

marched in opposition to the war against Iraq; as well as the tepid concerns and criticisms expressed by some Congressmen and retired generals during the Iraq War, provoked irate denunciations by the Executive as aid and support of terrorism. Amidst this growing opposition, the renewal of the *USA-Patriot Act* has also become a volatile election issue.

Amici have written that the U.S. imperialist rulers seek to conduct their wars and military adventures, and deal with the threat of domestic class struggle, without the need for Congressional approval, judicial oversight, or even a theoretical nod toward the democratic expression of the populace. Since the collapse of the Soviet Union and the U.S.'s ascendancy as the world's unchallenged military power, there has been a continuing pattern of the executive branch's usurpation of powers constitutionally granted to the judicial and legislative branches. It is the strengthening of what has come to be known as the "imperial Presidency." Over the last two decades, America's capitalists have secured a fabulous increase in their riches and profits through increasing the exploitation of the working class and slashing virtually all social programs benefiting the poor, particularly the black ghetto masses. America's rulers hate and fear the people. It is in the context of increasingly glaring inequality—and the potential for an upsurge in social struggle—that the capitalists' state reinforces its arsenal of repression.

The historical forebears of the SL, the early Communist Party and the then-Trotskyist Socialist Workers Party, were targets of earlier government witchhunts, surveillance, intimidation tactics and criminal prosecutions for advocacy protected by the First Amendment. *Amicus* SL has likewise been subjected to government surveillance and falsely targeted by government agencies as "terrorist" for the expression of Marxist political principles. As an elementary act of self-defense, as well as in support of the democratic rights of all citizens, immigrants and others in the U.S., the SL and PDC submit this *amici curiae* brief in support of Jose Padilla.

All parties have consented to *amici's* filing this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether the President has the authority, as Commander in Chief, to declare a United States citizen, detained in the United States outside a battlefield, an "enemy combatant" in the "war against terrorism" and indefinitely imprison him without bringing charges, holding a hearing, or allowing representation by counsel. Stripped of legalese, what the President asserts is nothing less than the right to disappear citizens.

The Executive has imposed martial law on Jose Padilla, a citizen, on the pretext of an alleged "war on terrorism" which is in fact not a military conflict but a political agenda. This is an unprecedented assertion of imperial powers by the President. Judicial deference to the President's determination of Padilla's status as an enemy combatant would relegate to the President the role of sole arbiter of the exercise and applicability of democratic, constitutional rights. This is consonant with the rationale of a police state.

The treatment of Padilla is intended as both the precursor and legal justification for application of Executive unilateral prerogatives on a broader scale, denying due process protections in criminal prosecutions, immigration proceedings and civil challenges to government policy. It is a frontal assault on the very concepts of due process and citizenship itself. Padilla is being forcibly expatriated, confined to a civil death. The imperial Presidency's objective is nullification of First Amendment freedoms and a qualitative diminution of all democratic rights. The Executive's targets are any and all perceived opponents of government policy, as evidenced most starkly by its preparation last year of the secretly drafted *Domestic Security Enhancement Act of 2003* (Patriot II), which would have allowed the Executive unchallengeable authority to strip citizenship from Americans who "provide material support" to an organization which at some time may be deemed "terrorist" by the U.S. government.

The case of Jose Padilla tests the very existence of the fundamental rights and privileges of citizenship embodied in the Bill of Rights and secured on the battlefield of the Civil War and in class and social struggle over the past hundred

and more years. If the imperial President is upheld, Padilla's detention threatens to become the *Dred Scott* case of our time, a declaration that "Citizens have no rights that the government is bound to respect."

LEGAL ARGUMENT

I. PADILLA IS NOT AN "ENEMY COMBATANT" BECAUSE THE "WAR ON TERRORISM" IS NOT A WAR IN ANY MILITARY SENSE

A. The "War on Terror" Is a Political Construct

The Executive claims it is justified in denying Padilla the constitutional protections attendant to a normal criminal prosecution based entirely on the emergency, preventative, national security needs of a putative ongoing "war against terrorism" being waged throughout the globe and on U.S. territory. It is a "war" without a defined enemy, a war without end. It is in fact no war by any military definition. There is no shooting war and no battle between state powers. The "war against terrorism" is a fiction, a political construct, not a military reality. It is a political crusade conducted in the name of ridding society of a perceived evil. It is no more a "war" in a military sense than a "war against cancer," "war against obesity" or a "war against immorality." Like the "war against communism" and the "war against drugs," this "war" is a pretext to increase the state's police powers and repressive apparatus, constricting the democratic rights of the population. The Executive's declaration that its "war against terrorism" forfeits constitutional protections for designated individuals echoes the regimes of shahs and colonels and presidents "for life" from the Near East to Africa to Latin America, to justify the mass imprisonment and unmarked graves of political dissidents. Like them, the Executive is proclaiming the *right to disappear* citizens of its choosing.

International law envisages two kinds of war: international armed conflicts between two or more countries, and civil wars occurring within the territory of a single state. Neither the Geneva Convention nor later protocols ever acknowledged armed conflict between a state and a transnational organization. The Geneva Convention addresses unlawful combatants, but not in the context of a transnational organization against a country or an alliance of countries. What the Executive has done is selectively apply martial law, placing a U.S. civilian citizen under military authority. This is a constitutional violation of Congress' enumerated "war powers" under Article I. *See Uniform Code of Military Justice*, 10 USC sec. 809; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

The disregard for what is black letter law on the application of laws of war and imposition of martial law is further evidence that the "war against terrorism" is not a "war" or "armed conflict" but a political campaign for political purposes. It is established legal principle that the Constitution forbids military detention of a citizen captured on American soil, so long as the "[civilian] courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of the actual war." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866). The imperial President knows the "war against terrorism" is not a war, as evidenced by the disavowal that the Geneva Convention protections apply to designated enemy combatants like Padilla, or to the Guantánamo detainees who were reportedly picked up in Afghanistan and Pakistan.

Taking the Executive's position to its conclusion, the assertion of its right to apply martial law means not only that the imperial President can detain enemy captives until the war ends, i.e., indefinitely; but also he has the prerogative to shoot enemy combatants engaged in active hostilities. In the "war against terrorism" that translates to the right to assassinate anyone, anywhere in the world alleged to be a terrorist, not just on foreign soil (as the U.S. has already claimed the right to do), but within the United States. *See* Roth, "The Law of War in the War on Terror," *Foreign Affairs* (Jan./Feb. 2004). Following the Executive's own logic, Padilla could have been shot to death in the Chicago O'Hare airport, just as well as being taken into custody. Thus the construct of the "war against terrorism" would justify not only the right to disappear citizens, but the right to assassinate them as well.

The pretext of "war" is being used by the Executive to circumvent the fact that if Padilla were alleged to be part of some criminal terrorist conspiracy, the government would be

constitutionally required to charge Padilla criminally and accord him a trial with the rights and protections of the Fourth, Fifth, Sixth and Eighth Amendments.

The Government and District Court's reliance on *Ex Parte Quirin*, 317 U.S. 1 (1942) is misplaced. In that case, a German saboteur during World War II claimed U.S. citizenship, and this Court held that for violation of the laws of war even an American citizen could be treated as an "enemy combatant." Unlike the present case, *Quirin* involved a real shooting war between state powers, and the combatants were provided a legal process (albeit a military tribunal) to determine guilt, considerably more process than the Executive or the District Court below has accorded Padilla. Moreover, Quirin, after consultation with counsel, stipulated to the facts supporting the enemy combatant designation.

B. The Imperial Presidency Demands Absolute Judicial Deference—A Move Toward a Police State

Based on the false proposition of an ongoing global "war against terrorism," the Executive asserts that it has the unchallengeable authority to decide who is a terrorist and subject such persons to martial law, demanding absolute and complete deference by the judiciary. This demand of unfettered power by the Executive is a move toward bonapartism, a police state, and requiring a compliant judiciary. Padilla's case is important not only because of the fate of this one man (and the others deemed enemy combatant by this President) but because the legal principles decided will provide precedent for other judicial challenges and justification for new legislation. As Justice Jackson warned in his dissent in the *Korematsu* decision, when the Executive "overstep[s] the bounds of constitutionality,...it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Deference to the Executive to deem a citizen an "enemy combatant" on the basis of hearsay "eradicates the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed to all citizens.... Courts must be vigilant in guarding Constitutional freedoms, perhaps never more so

than in times of war." *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (Motz, J., dissenting), *cert. granted*, No. 03-6696 (Jan. 9, 2004). *See also, Duncan, supra*, 327 U.S. at 322-23; *United States v. Robel*, 389 U.S. 258, 264 (1967). [2]

C. The Executive's "War on Terror" and Evisceration of Democratic Rights Are Based on Fabrications

Deference to the Executive is dangerous to the concept of liberty, particularly when the relied-on "factual" representations come from an Administration with a publicly documented propensity for blatant prevarication. American history is replete with examples of outright fabrications and manipulation of truth used to coerce a reluctant populace to go to war and justify other military depredations.[3]

The "war against terrorism" and the "war against Iraq" have comparably fabricated origins. The evidence is now indisputable that the Bush Administration decided within hours of the murderous attack on September 11 to use that event as a pretext for war against Iraq. A link between al Qaeda and Iraq was asserted, although there was no evidence of any cooperation between Saddam Hussein and

[2] Significantly, the Government has relied on a labor case, *Moyer v. Peabody*, 212 U.S. 78 (1909), to justify its claim that a determination by the President in his capacity as Commander in Chief is unassailable and beyond challenge in court. The *Moyer* case is "instructive," but not, as the government would have it, because it represents the state of law today. Rather *Moyer* demonstrates that the so-called "war powers" asserted by the government can and will be used against domestic political opposition, including labor unions, particularly when engaged in the organized withholding of labor—*i.e.*, a strike. *But see Scheuer v. Rhodes*, 416 U.S. 232 (1974) (rejecting argument that courts should defer to Governor's "good faith" in context of supposed 'mob rule' at Kent State University); *Sterling v. Constantin, supra* (Constitution may not be replaced by the "fiat of a state Governor.")

[3] Americans marched into this country's first imperialist slaughter, the 1898 Spanish-American War, under the bloodcurdling call to "Remember the Maine," based on the fiction that the battleship Maine was blown up by an enemy mine. In truth the explosion was caused by a faulty construction design. In order to reverse isolationist sentiment, President Franklin Delano Roosevelt deliberately provoked the Japanese into attacking U.S. military forces, thereby assuring U.S. entry into World War II. Many historians believe the administration knew the attack was coming

Osama bin Laden. Even with the passage of time and the interrogation of some 3,000 Qaeda operatives around the world, the Bush Administration cannot manufacture even a hint of such a link. The war against Iraq (which was in reality a one-sided slaughter) was demanded by the President on the basis of purported hard factual evidence that Iraq possessed "weapons of mass destruction" (WMD) which posed an imminent threat to the U.S. Not only have none been found a full year into the U.S. occupation of Iraq, but there are also daily press exposés of intelligence information documenting that the Administration's claims regarding Iraqi chemical and biological weapons and nuclear capacity were not only false, but known to be false.

In the days immediately following September 11, 2001, the mass roundup of non-U.S. citizens from Islamic countries was justified on the basis of suspicion of terrorism. The Department of Justice's own Inspector General Report, issued June 2, 2003, found a "pattern of physical and verbal abuse" and that detainees were classified as terrorism suspects without evidence. *Department of Justice Inspector General Report*, 2 June 2003. Not one terrorism charge came from that roundup and subsequent registration of 80,000 non-citizen males from Arab countries, but these resulted in some 13,000 deportation proceedings, solely for immigration violations. In the face of blatant proof of the Executive's lies and abuses, Attorney General John Ashcroft not only disclaims wrongdoing but demands from Congress additional state repressive powers—to make their actions "legal."

Jose Padilla's case is itself an example of Administration falsification. Attorney General Ashcroft announced Padilla's

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and did nothing about it to make it that much easier to declare war. *See* Charles Beard, *President Roosevelt and the Coming of the War 1941* (1948). President Truman dropped two atom bombs on Hiroshima and Nagasaki despite knowledge that the Japanese were already trying to surrender, both as an act of pure racist spite and to intimidate the Soviet Union and affect the postwar world order. In 1964 the Johnson administration manufactured a Vietnamese attack on American warships in the Gulf of Tonkin to line up Congressional support for a vast expansion of American bombing and ground troops to Vietnam.

apprehension to a widely publicized press conference in Moscow: "We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb'." That the government knew there was no such "terrorist plot" was revealed in short order. Deputy Defense Secretary Wolfowitz conceded on national television, "I don't think there was actually a plot beyond some fairly loose talk." *Guardian*, 13 June 2002. Former Defense Secretary James Schlesinger stated that the prospect that Padilla had anything to do with a "dirty bomb" was "not realistic," making clear that the issue was "intent" and "threat," not criminal acts. *New York Times*, 11 June 2002. "FBI officials speaking to the Associated Press on condition of anonymity, said their investigations had concluded that Mr. Padilla was probably no more than a 'small fish' with no ties to al Qaeda in the U.S." *Guardian*, 15 August 2002.

The Court of Appeals decision granting Padilla's writ of habeas corpus (*Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d 695) should be affirmed on the most basic grounds, beginning with disavowal of the President's imperial authority to assert martial law in the United States and indefinitely detain a U.S. citizen on the false bases that he is an enemy combatant and that the U.S. is engaged in a timeless and limitless military "war" with al Qaeda.

II. IT TOOK A CIVIL WAR TO ESTABLISH THE RIGHTS AND PRIVILEGES OF U.S. CITIZENSHIP—PADILLA HAS BEEN FORCIBLY DEPRIVED OF HIS CITIZENSHIP AND ATTENDANT RIGHTS IN VIOLATION OF THE CONSTITUTION

Padilla's case presents a frontal assault on the very notion of citizenship. Padilla's designation as an enemy combatant, forfeiting all constitutional protection, constitutes *involuntary expatriation*, precluded under the Constitution. As Chief Justice Earl Warren stated:

> "*Citizenship is man's basic right for it is nothing less than the right to have rights.* Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his country-

men.... His very existence is at the sufferance of the state...deprived of the right to assert any rights. This government was not established with power to decree this fate."

—*Perez v. Brownell,* 356 U.S. 44, 64-65 (1958) (Warren, J., dissenting) (emphasis added)

In *Trop v. Dulles,* 356 U.S. 86 (1958), decided the same day as Perez, the Court declared legislation depriving a person of citizenship following military conviction for desertion from military service during wartime unconstitutional on Eighth Amendment "cruel and unusual punishment" grounds.

"Denaturalization as punishment may involve no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.... In short, the expatriate has lost the right to have rights."

—350 U.S. at 101.

That is the fate—*civil death*—the Government seeks to impose on Padilla in this case.

The rights of citizenship in the United States are the cumulative product of not only the American Revolution, but the bloody battlefields of the Civil War and the class and social struggles of the 19th and 20th centuries. The expatriation of Padilla, if upheld by this Court, would undo over 200 years of hard-fought gains that have extended the very definition of citizenship. To understand the historic stakes posed in this case, it is necessary to review the historic struggles embodied in the current legal concept of citizenship.

The United States Constitution is in reality three Constitutions, each of which codifies in legal formulations the outcome of vital historic changes in American social history. Each of these Constitutions embodies an expanding conception of citizenship. The First (1787) Constitution arose out of the American War of Independence. That period of

bourgeois revolutionary struggle both coincided with and was part of the Age of Enlightenment, characterized by an ideological adherence to natural rights, hostility to monarchy and suspicion of centralized government. Under feudal monarchies, which justified their power as divinely derived, the bulk of the population were no more than subjects of the crown, *i.e.,* a subjugated population without any political rights. The process of colonization and incorporation of successive waves of aliens into the colonial community resulted in an American citizenship that was not simply a substitution of allegiance to the republic replacing loyalty to the British crown. The ideological conception of citizenship in the American republic was that the Government derived its "just powers from the consent of the governed." *Declaration of Independence.* Yet, in reality, full participation in the American political community was limited to white male property owners. " [B]y the 'rights of man' they meant in actual fact the rights of that limited class of men who owned the instruments of production in society." Laski, *supra,* at 37. As John Jay succinctly put it: "The people who own the country ought to run it."

The conception of the 1787 Constitution was that of separation of powers, including between the states and the federal government. This was called federalism and behind its shield American slavery existed and developed for over half a century before it was destroyed on the battlefields of the Civil War. In substance the 1787 Constitution codified two co-existing and battling social systems, the Southern plantation economy based on slavery and the developing Northern system of capitalism requiring "free labor."

Within two years, the Second Constitution was introduced through the Bill of Rights. But consistent with the federalist "compromise," the Bill of Rights was intended as a protection only against potential excesses of the federal government and not as a protection against the exercise of state governmental authority. The existence of slavery was thus "a major reason why the Supreme Court delayed so long in attempting to enunciate an authoritative doctrine of citizenship. Any effort to eliminate the inconsistencies and ambigu-

ities in the law ultimately would have to address the problem of Negro citizenship." Kettner, *Development of American Citizenship 1608-1870* (1978) at 324.

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) this Court attempted to resolve that question by denying that black citizenship was a possibility. The central holding of *Dred Scott* was that black people—whether slave or free—were not, and *could not be*, citizens of any of the states or of the United States. This was the underlying position for Chief Justice Taney's infamous declaration that black people "had no rights which the white man was bound to respect." Reflecting the hold of the slavocracy's interests on the Supreme Court, and indicating that the conflict between social systems would not be settled short of civil war, the *Dred Scott* decision held that the Fifth Amendment Due Process clause guaranteed and protected the property rights of the slaveholders; therefore the provision in the Missouri Compromise banning slavery in the territory was an unconstitutional deprivation of property. It was the dissenting justices in the Dred Scott case who stated that "The most general and appropriate definition of the term citizen is 'a freeman'."

It took the defeat of the slavocracy in the Civil War—including participation by 180,000 black troops—to make that concept of citizenship a reality. Only with the defeat of the slavocracy were "the feudal fetters on political and economic freedoms broken or transcended." The competition between the dual economic systems was eliminated. "The Third Constitution codifies the completion of the American bourgeois democratic revolution creating a national American state, founded on the hegemony of the first ten Amendments and of the Reconstruction Amendments, subordinating the federalism of the First Constitution." Franklin, *supra*, at 173-74. The Thirteenth Amendment (1865) abolished slavery.

As a first step toward defining the rights of citizens, the *Civil Rights Act of 1866* was passed to overturn the *Dred Scott* decision. The Act defined all persons born in the U.S. as national citizens and established affirmative rights of free labor to be enjoyed regardless of race: including making contracts, bringing lawsuits, owning property, receiving equal treatment in courts and by government officials. The Act provided that no action by state or local custom could deprive an individual of these basic rights. The Fourteenth Amendment (1866), for the first time, provided a Constitutional definition of national citizenship, applying to "all persons born on U.S. soil or naturalized." The Fourteenth Amendment also prohibited states' restrictions on privileges and immunities of citizens without due process of law or denying equal protection. The Fourteenth Amendment thereby not only recognized national citizenship, but also guaranteed the qualities of citizenship, without which it would be citizenship without content.

Within a mere five years after the passage of the Fourteenth Amendment, its purpose was vitiated by Supreme Court decisions reflecting the emergence of the American imperialist state and the defeat of the great democratic effort of Radical Reconstruction. *Slaughter-House Cases*, 16 Wall. 35 (1873) (Fourteenth Amendment did not make the core rights of national citizenship—due process and equal protection—binding on the states); *United States v. Cruikshank*, 92 U.S. 542 (1876) (Fourteenth Amendment protection was specifically denied in the arena of civil rights); *Civil Rights Cases*, 109 U.S. 3 (1883) (same). The 1896 *Plessy v. Ferguson*, 163 U.S. 537 decision declared "separate but equal" the law of the land, holding that state-required racial segregation did not violate the equal protection clause. During this period, the Fifteenth Amendment mandate that "the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" was totally disregarded.

Even while Fourteenth Amendment due process and equal protection were denied to the U.S. citizens for whom it was adopted, the Court ruled that *corporations were "persons"* within the meaning of the Constitution and protected from government regulation under the doctrine of substantive due process. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). From 1886 to 1912, only two Supreme Court cases restrained or

overturned state action involving discrimination against black people, while 39 times the Court did so in cases involving corporations. As Laski explains, *supra* at 157-58:

> By 1880 the Supreme Court had become the passionate exponent of economic laissez-faire. It remained thus for a quarter of a century. During this period its dominating purpose was simply to prevent interference with business enterprise by government regulation, whether state or federal. It evolved conceptions of liberty of contract, of due process of law, of the police power, of reasonableness, all of which operated to protect business men in the unhampered pursuit of profit.... [T]hey illustrate the inevitability that constitutional law must be subordinated in a capitalist society to the needs of capitalism."

Hence, although many today would take it for granted that American citizenship is a birthright of anyone born here, that modern conception is actually a recent and reversible victory. It took a full century of further class and social struggle after the Civil War for the rights and privileges promised in the Fourteenth Amendment under its due process and equal protection clauses to be held as a matter of law applicable to all citizens of this country. It took the social upheaval of the mass civil rights movement and United States war in Vietnam to break the social and legal lock created during the Cold War with the post-World War II Soviet Union. Moreover, in the context of international competition with the Soviet Union, the American capitalist class found it convenient to play the card of "human rights." Yet that card had limited utility while American citizens were visibly being deprived of the most basic rights. Thus it was only in 1967 that the Court for the first time acknowledged the principle that the Fourteenth Amendment established citizenship as "the constitutional birthright of every person born in this country." In the midst of the civil rights movement, *Afroyim v. Rusk*, 387 U.S. 253 (1967) held that once a person becomes a citizen, Congress cannot deprive him of that status. Afroyim fundamentally adopted Chief Justice Earl Warren's dissent in *Perez*.

Afroyim precludes Padilla's *de facto* expatriation by the

President. Neither Congress nor the Executive can use the implied Constitutional powers to deal with foreign affairs or national security to override the fundamental constitutional right of citizenship and its attendant rights and privileges.

> "There is no indication of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time... Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."

Id. at 262.

Just as the reality of citizenship for the vast majority of Americans has been the product of convulsive social struggles, the rights of citizenship are reversible in the context of social reaction. With the decline of the social struggles of the 1960s, and particularly with the collapse of the Soviet Union in 1991-92, the American bourgeoisie has taken aim at the rights gained through those earlier struggles. Under the guise of the "war on terrorism," the Executive is now taking aim at the most fundamental right of all—the "right to have rights"—*i.e.*, citizenship. What is posed here is whether Padilla will become the Executive's implementation of a revision of the infamous *Dred Scott* decision: *Citizens have no rights that the government is bound to respect.*

III. PADILLA IS DEPRIVED OF HIS LIBERTY IN VIOLATION OF DUE PROCESS

The detention of Jose Padilla as an "enemy combatant" cuts at the heart of the core protections of the First, Fourth, Fifth, Sixth and Eighth Amendments which provide the content to the rights and privileges of citizenship. Freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504, U.S. 71, 80 (1992). This Court has long recognized both substantive and procedural limits placed on government capacity to restrain individual liberty, even in the face of a "national emergency" or war, so long as civilian courts were functioning. *See Ex Parte Milligan, supra. See also Youngstown Sheet & Tube Co. v. Sawyer,*

343 U.S. 579 (1952); *Ex Parte Endo*, 323 U.S. 283 (1944), and *Sterling v. Constantin*, 287 U.S. 378 (1932). There is not a single sentence in the Constitution that declares exceptions to these principles, let alone an exception for a citizen detained outside a battlefield as an "enemy combatant."

Nor can there be any question that Padilla's liberty is being taken without due process of law, which at a minimum means the right to be apprised of charges against him and to challenge these charges in a judicial forum with the benefit of legal counsel. It also requires that he be *presumed innocent* until proven guilty beyond a reasonable doubt. Central to the Executive's treatment of Jose Padilla is its assertion that any "fact" tending to support the President's designation of Padilla as an "enemy combatant" mandates he be deemed so, and as a consequence stripped of all constitutional rights. While Padilla is deprived of the presumption of innocence, the Government is bestowed an irrebuttable presumption of veracity.

With the cases of Jose Padilla, as well as Yasser Esam Hamdi,[4] John Walker Lindh and Zacarias Moussaoui, and the hundreds detained at Guantánamo, the Government seeks to institutionalize in the American justice system the arbitrary deprivation of rights that are the hallmarks of right-wing dictatorships propped up around the world by U.S. imperialism.[5] In short, the Executive is establishing a parallel legal system, one with no laws or rules, for anyone the President chooses to disappear.

Internationally, the U.S. has kidnapped foreign nationals suspected of terrorism, imprisoned suspects indefinitely and authorized assassinations, overriding international conventions and its own longstanding ban on assassinations. The U.S. government is holding over 600 prisoners, including teenagers detained as juveniles, as enemy combatants at the American base in Guantánamo, Cuba, refusing to treat them according to international conventions as "prisoners of war."

[4] *Amici* submit that the indefinite detention of Yaser Esam Hamdi, an American citizen allegedly detained in a "zone of combat" in Afghanistan, violates the Due Process clause of the Fifth Amendment, and urge that the Fourth Circuit decision in his case be reversed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, No. 03-6696 (Jan. 9, 2004).

Additionally, the Executive is gutting "fair trial" and due process protections applied in criminal prosecutions. For example, the prosecution sought to try Zacarias Moussaoui in proceedings closed to any public scrutiny, but also to deny him even the right to review critical evidence because he is not cleared for security proceedings. The Executive is wielding the threat of declaring individuals charged in the criminal courts as "enemy combatants" in order to coerce "cooperation" or guilty pleas.

Prior to September 11, the Supreme Court has repeatedly held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are applicable to immigrants. *Plyer v. Doe*, 457 U.S. 202 (1982); *Wing Wong v. U.S.*, 163 U.S. 22 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Zadvydas v. Davis*, 533 U.S. 678 (2001). But by the very fact that non-citizens have no inalienable right to be in the United States, without citizenship there is no "right to have rights." For example, while the First Amendment formally grants immigrants the same speech and association rights as U.S. citizens, the exercise of those rights carries with it the risk and fear of detention and deportation.[6]

In short, the decision on Padilla's case is intended by the Executive to provide a post-facto legal basis for what the government has been doing pre-emptorily since September 11. Asserting "national emergency," some 1,200 immigrants from Arab/Islamic countries were rounded up and detained as putative "terrorists." The Executive, with bipartisan support, rammed through Congress the draconian *USA-Patriot Act* authorizing widespread wire-tapping, surveillance and break-ins on the basis of political advocacy and establishing sweeping legal authority for secret mass detentions and deportations of immigrants; implemented new FBI Guidelines reviving the deadly COINTELPRO campaign of

[5] *Amici* would point out that the "anti-terrorism" laws of Peru, which provided for trial by hooded judges, with no right of the accused to call witnesses or confront their accusers, granted more rights than this Executive has accorded Padilla. Peru recently declared those laws to be unconstitutional.

surveillance, intimidation, disruption and frame-up; ordered military tribunals for non-citizens seized in Afghanistan and Pakistan, holding them in torturous conditions in Guantánamo. The Government has laid the groundwork for an all-encompassing government spying apparatus, from the Pentagon's Big Brother *Terrorist Information Awareness Program* to surveillance of travel via the *Computer Assisted Passenger Pre-Screening System* (CAPPS II).

The President's assertion of the prerogative to strip citizens of their rights and lock them away indefinitely without charges, lawyers or trials and to deny all known formal protections of the First, Fourth, Fifth and Six Amendments is an unprecedented assertion of imperial power. Under the pretext of the "war against terrorism," the Executive has dismantled those formal protections and limitations on police and government powers—particularly in the application of all forms of secret surveillance, detention plans, anti-immigrant policies and counter-intelligence disruption techniques, including murder and legal frame-ups—that were won in the quarter century encompassing the mass civil rights movement, the U.S. defeat in Vietnam and the Watergate exposure that government dirty tricks extended even to representatives of the capitalist ruling class. The substantial danger and significance of the new laws, orders and directives lie in the fact that they constitute a full-scale legalization and mandate for the state to conduct its spying, harassment, prosecution and worse against immigrants, blacks and all perceived political opponents. What the government previously did in secret it now seeks to do with the authority of a legal mandate.

IV. PADILLA'S DETENTION AS AN ENEMY COMBATANT POSES A GRAVE THREAT TO THE FIRST AMENDMENT RIGHTS OF EVERYONE

To retool its machinery of repression under the guise of

[6] In the wake of the post-September 11 anti-immigrant witchhunt, this Court recently upheld a provision of the draconian 1996 Illegal Immigration Reform and Responsibility Act mandating imprisonment of legal immigrants who are facing deportation for even the most minor convictions at some point in their lives. Demore v. Kim, 123 S. Ct. 1708 (2003). Among other reasons this underscores why *amici* call for full citizenship for all immigrants.

its "war on terror," the Executive seeks to fashion a new, more dangerous arsenal of thought-crime conspiracy laws, prosecuting its victims on the basis of political views and associations rather than conduct or actions. The threat posed by this could not be graver, for no aspect of citizenship is more fundamental than the rights accorded by the First Amendment. The First Amendment is the "keystone of our Government...the freedoms it guarantees provide the best insurance against destruction of all freedom," stated Mr. Justice Black, dissenting in *Dennis v. United States*, 341 U.S. 494, 580 (1951). It was to protect the exercise of the political freedoms codified in the First Amendment that the proscriptions on unlawful search and seizure, prohibition on excessive bail (*i.e.*, indefinite detention), right to counsel and the due process clauses were adopted as part of the first ten Amendments to the U.S. Constitution. *See Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961).

A. Padilla Is Deemed an Enemy Combatant on the Basis of Alleged Association

The Presidential Order declaring Padilla an enemy combatant is based on assertions that "Padilla is closely associated with al Qaeda....engaged in hostile and war-like acts" including unspecified "conduct in preparation for acts of international terrorism," possesses information that would be helpful in preventing al Qaeda attacks, and represents a "continuing, present and grave danger to the national security of the United States." His incarceration is not based on the commission of any crime, or even the allegation thereof. Instead it is expressly based upon his purported associations. Padilla cannot be deprived of his liberty based on undefended allegations of association and vague hearsay assertions of intent to commit some future act. With the sweep of his hand, the President has simply declared Padilla an enemy combatant, thereby denying him those fair trial protections accorded to criminal prosecutions.

The basis for Padilla's unlawful detention in the absence of any crime even being charged, let alone committed, is mirrored in both the Patriot Act and its proposed reinforcement, Patriot II. Both Acts threaten a wide scale of government

attacks from wiretapping and break-ins to indefinite detention and, if Patriot II is passed, loss of citizenship. The trigger of such repressive measures is the nebulous act of providing "material support to terrorism." What constitutes "material support" can be anything the government doesn't like. And what organizations are deemed "terrorist" can vary from day to day, depending on the Administration's whims. As the case of attorney Lynne Stewart illustrates, this provision in the earlier 1996 *Anti-Terrorism Act* provided the basis for the government to indict a political activist attorney as a terrorist co-conspirator. *See United States v. Sattar et al.*, No. 02 Cr. 395 (S.D.N.Y.), Superceding indictment filed November 19, 2003 (charging Stewart with "material support" of terrorism for zealously representing client charged with terrorism).

B. The Government's Position Is the Latest Extension of a Long History of Invoking Thought-Crime Laws and Detention During Times of War and Social Struggle

The seminal case arising out of the Nixon Administration's use of politically motivated and warrantless surveillance against opponents of the U.S. war in Vietnam is *United States v. United States District Court*, 407 U.S. 297 (1972), which precluded the Executive from assuming power in violation of the Constitution.

> "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect 'domestic security'."
>
> —407 U.S. at 313

In his book, *All the Laws But One: Civil Liberties in Wartime* (Knopf/Vintage, 1998), Chief Justice William Rehnquist asserts that "in times of war, the law is silent," and admiringly quotes Francis Biddle, Roosevelt's attorney general:

"The Constitution has not greatly bothered any wartime president." Rehnquist further states that "In times of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond." Particularly in times of war, or fear for "national security" in the face of revolutionary upheaval abroad or class struggle at home, the government has whipped up hysteria as a pretext to justify denying First Amendment rights and other core constitutional protections to the population. In virtually every instance the courts upheld the government's acts (at least initially).

The Bill of Rights was less than a decade old in 1798 when war hysteria prompted by the Jacobin French Revolution prompted the Federalist-dominated United States Congress to enact the *Alien and Sedition Acts*. Constitutional challenges to the Acts were generally precluded in the federal courts. The American bourgeoisie's emergence as an imperialist power was also prepared by, and fueled, attacks on the U.S. working class, particularly targeting immigrant workers. From the national railway strike of 1877 to the execution of the Haymarket martyrs in 1887 to the 1892 steel strike in Homestead, Pennsylvania, the class struggle was marked by one labor massacre after another. The 1890 *Sherman Anti-Trust Act* was used to criminalize labor unions. A 1902 anti-anarchist law in New York became the model for state and federal "criminal syndicalism" laws which targeted organizations and individuals seeking "a change in industrial ownership or control, or effecting any political change." In 1903 Congress passed the first legislation barring immigrants who "believe in or advocate the overthrow by force and violence" of the U.S. government.

During World War I and in fearful reaction to the Russian Revolution, *the Espionage Act* (1917) and the *Sedition Act* (1918) were passed. These Acts targeted not "German spies" but labor agitators, opponents of U.S. entry into World War I, anarchists, and "reds," thousands of whom were imprisoned. Among them was Socialist Party leader Eugene V. Debs, for a speech containing the incendiary message to workers: "You need to know that you are fit for something better than slavery and cannon fodder." *See Debs v. United States*, 249 U.S. 211

(1919). *See also Schenck v. United States*, 249 U.S. 47 (1919). Soon after, the notorious Palmer Raids in 1919 caused the detention and deportation of thousands of immigrants accused of being anarchists or "reds."

In 1940 Congress, concerned with the increased possibility of the United States entering into World War II, passed the *Alien Registration Act* (better known as the *Smith Act*). The first to be prosecuted for their opposition to the impending interimperialist war were the Trotskyists of the Socialist Workers Party, many of whom had played a leading role in the 1934 Minneapolis Teamsters strike. The convictions for "seditious conspiracy" were affirmed by the Court of Appeals, *Dunne v. United States*, 138 F2d 137, and this Court refused review, 320 U.S. 370 (1943).

The history of state repression also includes many instances of threatened and actual mass detentions. The internment of American citizens of Japanese descent during World War II, *Korematsu v. United States, supra*, is a notorious example of trampling on democratic rights of citizens during wartime. In February 1942, Roosevelt issued Executive Order 9066, which authorized detention and relocation of Japanese residents in the U.S., in the majority native-born U.S. citizens, into concentration camps. Congress quickly ratified the order. This Court upheld the imposition of martial law, stating, "When under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Korematsu v. U.S., supra.* Forty years later, in *Korematsu v. United States*, 584 F. Supp 1406 (N.D. Cal. 1984), his conviction was reversed on the grounds that the government misrepresented the existence of "intelligence" justifying or providing a clear, military necessity for evacuation orders in the first place.

Although the numbers detained under the guise of the present "war against terrorism" are much smaller than the numbers of Japanese-Americans detained during World War II, the degree of unilateral power presently asserted by the Executive is far greater than before. The Japanese Americans were relocated, costing them loss of property, but they were not held incognito, nor denied access to the civilian courts, as

today's "enemy combatants" are. The President also asserts an "inherent" right to disappear citizens even in the absence of Congressional authorization.

Following World War II, plans were laid for additional mass detentions at the height of the McCarthyite anti-communist witchhunt. Deeming the Smith Act to be insufficient protection against threats to internal security, in 1950 Congress enacted the *Internal Security Act of 1950*, 50 USC 781-798, 811-826, amended 1968, more commonly known as the *McCarran Act*. This Act went beyond prohibiting advocacy of force and violence. Title I was an elaborate scheme of registration for certain types of organizations, known as the *Subversive Activities Control Act;* Title II was a separate criminal sedition law. Title III of the Act was the *Emergency Detention Act*, permitting detention of suspected subversives in periods of emergency. It also provided for the deportation of aliens found to be Communists at any time in their lives. During the Cold War a "Security Index" kept by FBI headquarters contained nearly 12,000 "leaders" while the "Communist Index" added another 17,000 members. The anti-Communist Security Index, supposedly dismantled in the 1960s was resurrected as the Administrative Index (ADEX). The SL was among 16 organizations designated on the ADEX file for "special attention."

In 1961, the *Subversive Activities Control Act* was upheld by this Court against the Communist Party. However, Government attempts to enforce the subsequent registration order proved fruitless—each attempt was successfully challenged on the grounds that prosecution of individuals for failure to register violated the Fifth Amendment protection against self-incrimination. Ultimately this Court concurred, striking down the prosecutions on Fifth Amendment grounds but leaving the Act in force.

The detention provisions were to spring into operation upon the President's proclamation of an emergency in the event of invasion, declaration of war, or insurrection in aid of a foreign enemy. There was no provision for judicial proceedings before detention and only limited review, in which the evidence could be withheld, after detention occurred.

C. By Its Letter and History, 18 U.S.C. sec. 4001(a) Is Dispositive of this Case

The *Emergency Detention Act's* provisions were never invoked, and ultimately it was repealed in 1969 as one of the democratic gains emanating from the social struggle of the civil rights and Vietnam antiwar movements of the 1960s and early '70s. When the *Emergency Detention Act* was repealed, the Congressional Report ends with: "Repeal of the Act alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority." As a result, at the same time Congress repealed the Emergency Detention Act, it also enacted 18 U.S.C. sec. 4001(a), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Section 4001(a)'s clear, straightforward disavowal of Presidential imperial power to detain citizens without lawful authority is the sole legislative constraint on the Executive's police power to come out of the brief period of expansion of judicial recognition of democratic rights during the civil rights movement and Vietnam War period. Those democratic rights, won through social struggle, are reversible, and have been chipped away over the past 30 years. The Act also recognized the long history of the government's improper detention of political opponents and minorities. *Padilla*, 352 F.3d at 719-20.

By its plain language as well as its legislative history, Section 4001(a) is determinative of this case, and should be upheld against the Executive. Section 4001(a) was intended to constrain the imperial Presidency's impulse to detain any it views as hostile to its aims. The need for such constraint is confirmed by the long series of largely Executive actions since section 4001(a) was enacted which are contrary to its clear injunction against detention of citizenship. As early as 1970, the same year section 4001(a) was passed, a proposal was drafted calling for martial law and the establishment of "relocation" camps for black people in the event of a black uprising. In 1978, the *Foreign Intelligence Surveillance Act* (FISA) was passed, authorizing secret electronic surveillance and physical searches of agents of a foreign power, including

U.S. citizens at home and abroad. The 1983 FBI Domestic Security/Terrorism Guidelines replaced more restrictive self-imposed FBI rules in the wake of the Watergate, CIA and FBI/COINTELPRO exposures. These regulations redefined what had been deemed "subversive" activity as "terrorist," authorizing investigation of left-wing organizations although no crimes had been committed or even alleged. In 1984, the Reagan Administration drafted plans to empower the Federal Emergency Management Agency (FEMA) to appoint military commanders to run state and local governments in the event of a national emergency. After the U.S. bombing of Libya in 1986, the Immigration and Naturalization Service drew up a similar "contingency plan" for "alien terrorists and undesirables" that called for rounding up thousands of Arab immigrants and herding them into an already prepared concentration camp in Louisiana.

Clinton's *Violent Crime Control and Law Enforcement Act* of 1994 and the *Anti-Terrorism and Effective Death Penalty Act of 1996* had the combined impact of a legislative rollback of various court decisions enforcing constitutional rights. The Crime Bill allowed evidence seized in an illegal search to be admitted into evidence, provided billions of dollars to build prisons and increase the number of police on the streets. The 1996 *Anti-Terrorism Act*, established a wide range of anti-immigrant procedures. The law defined foreign terrorism, provided for the Secretary of State to designate foreign terrorist organizations and made it a crime to provide "material support" to any proscribed terrorist organization and a crime to support terrorist activity abroad. These Executive fiats reach their culmination in the present case, in which the Executive asserts its unilateral right to disappear citizens under the guise that they are "enemy combatants."

Although initially denying any need for Congressional authority for the detention of a U.S. citizen on U.S. soil, the Executive now seeks to find such authority in the Joint Resolution. As the Court of Appeals correctly held, that Resolution does not contain any explicit authorization to detain citizens off the battlefield. 352 F.3d at 723. Such express authority would be required not only to overcome

the clear statutory mandate of section 4001(a), but also the mandate of the *Posse Comitatus Act*, 18 U.S.C. sec. 1385, prohibiting the military from acting as law enforcement agents without express Congressional authorization. But more fundamentally, Congress is no more empowered than the Executive to order that citizens be disappeared without due process of law.

CONCLUSION

What this Court decides regarding the fate of Jose Padilla has direct and immediate ramifications way beyond the particulars of this case. To grant the Executive the power to declare any perceived political opponent a "terrorist" and therefore an "enemy combatant"—which is precisely the power that the President asserts in this case—would eviscerate the rights of the working people, minorities and the oppressed to associate in common struggle against oppression and exploitation. At the most basic level, Padilla's case will be critical to establishing whether this Executive will obtain blanket judicial approval for a wholesale evisceration of democratic rights. In demanding deference as Commander in Chief, the President is asking for nothing less. This bald attempt to substitute Executive fiat as the Supreme Law of the Land must not be countenanced. For the reasons stated above, the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

RACHEL H. WOLKENSTEIN, ESQ.
(Counsel of Record)
PAUL COOPERSTEIN, ESQ.
67 Wall Street, Ste. 2411
New York, NY 10005
(212) 406-4252

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